Filed 11/23/09 In re D.L. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re D. L., a Person Coming Under the Juvenile Court Law.	
CONTRA COSTA COUNTY BUREAU OF CHILDREN AND FAMILY SERVICES, Petitioner and Respondent, v. J. L., Objector and Appellant.	A121881, A122979 (Contra Costa County Super. Ct. Nos. J0601470, J0801099)

In these consolidated appeals, Father challenges a decision declaring his son, D.L., a dependent of the juvenile court and restricting Father to supervised visits. Because D.L. did not reside with Father when the events giving rise to these proceedings occurred, Father says the juvenile court erred when it failed to consider placing D.L. with him as required by Welfare and Institutions Code[1] section 361.2. Father also challenges the court's decision to afford him twice monthly supervised visits. We conclude that the juvenile court made the finding required by section 361.2 when it declared D.L. a dependent of the juvenile court. We also conclude the court acted appropriately out of

[1] Further statutory references are to the Welfare and Institutions Code.

concern for D.L.'s well-being and did not abuse its discretion when it restricted Father to supervised visits. Thus, we affirm.

BACKGROUND

A. The Dependency Proceedings

D.L. was born in November 2001. Although Father and Mother never married, Father reportedly "resided with [Mother] sporadically while [D.L.] was an infant."

A dependency proceeding was filed in August 2006. Mother entered a no contest plea to jurisdictional allegations that her history of substance abuse and susceptibility to abusive relationships placed D.L. in jeopardy. The court dismissed other allegations that Mother, who by then had married Father's brother, engaged in domestic violence and had left D.L. with her husband who had been arrested for possession of narcotics. The court terminated jurisdiction in this first proceeding in April 2008.

The judgment ordered that D.L.'s legal custody be shared by Mother and Father, but sole physical custody of D.L. was awarded to Mother and he was to primarily reside with her. Father was permitted to have two hour supervised visits with D.L. twice each month. Although Father appealed the judgment in this proceeding and it has been consolidated in this appeal, in light of subsequent events that we will discuss, he seeks no relief. Rather, he asks that we review the record of this first dependency as historical background that is relevant to the claims he makes regarding the proceedings conducted on a successive petition. We will do so.

The successive petition was filed in June 2008 after Mother was arrested for drunk driving just months after the first case was dismissed. D.L. was removed from Mother's custody because her chronic substance abuse impaired her ability to care for him and her persistent involvement in abusive relationships, including with Father, jeopardized D.L.'s safety. Again, Mother entered a no contest plea to the allegations and stipulated to the court's dependency jurisdiction. The court ordered family reunification services, except for provisions relating to Father's visitation with D.L. The parameters of Father's visitation were decided after a contested hearing. Father at no time requested that he be

granted physical custody of D.L. Rather, he argued that he should be afforded unsupervised visits.

Following the hearing, D.L. was adjudged a dependent of the juvenile court removed from Mother's home. There was a finding that placement of D.L. with Father "would be detrimental to the safety, protection, or physical or emotional well-being of the child." Father was ordered hour long supervised visits twice per month. He appeals.

B. Facts of Father's Visitation and Interaction with D. L.

When the first dependency case began, Father was allowed supervised weekly visits with D.L. pursuant to a family court order. Between November 2005 and March 2006, Father missed six weekly visits. As of March 2006, the visits stopped. Father says this was because Mother moved away and he didn't know where to find her. Mother and D.L.'s maternal grandmother, who supervised Father's visits, said that it was Father who disappeared. In October 2006, the court ordered supervised visits for Father with a therapist's approval.[2] But it was a long time before a therapist approved visits.

In December, a therapist reported that she could not determine whether to recommend visits because Mother had cancelled so many of her counseling sessions with D.L. Later that month, the court ordered Mother to take D.L. to weekly sessions. In January 2007, the therapist recommended that D.L. have no contact with Father. She reported that D.L. said he didn't like Father and that Father was "mean" and "weird." It was difficult for the therapist to determine whether the sentiments expressed by D.L. were his own or those expressed to him by Mother. In late January, the court prohibited Father from having any contact with D.L. until a further court order.

In February, after testing established that Father was D.L.'s biological parent, Father was provided referrals for various services. While it appears he accepted referrals for parenting classes and individual therapy, he declined to participate in substance abuse testing or treatment, or domestic violence group counseling.

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[2] Rulings regarding Father's alleged domestic violence were held in abeyance.

By April 2007, Father had yet to visit with D.L. because no therapist had approved of visitation. Nevertheless, the Children and Family Services Bureau recommended that the court grant Father monthly supervised visits provided they were to be scheduled after taking into account D.L.'s wishes and those of his therapist and counsel. The following month, Father sought to be declared D.L.'s presumed father, requested regular, frequent and unsupervised visits, and any other services necessary for D.L.'s benefit. By this time, Father had not seen D.L. for over a year and was actively engaged in therapeutic counseling. Father anticipated that his therapist would provide the court a letter supporting his suitability for unsupervised visits with D.L.

The Bureau opposed Father's request for unsupervised visits. In a report prepared for the hearing on Father's application, the Bureau recited Father's lack of consistent support and care for D.L. prior to any dependency proceedings, and his disregard of orders restraining him from any contact with Mother as examples of his "erratic behavior" that should preclude unsupervised visitation. Father's therapist also provided the promised report. Although the therapist concluded that Father was "capable of visiting with [D.L.] and interacting appropriately with him," the therapist's conclusion was "only provisional" without an opportunity to observe Father and D.L. together.

The court declared Father was D.L.'s presumed father, provided Father reunification services through Mother's plan and ordered supervised visitation. Visits were set for one hour once each month, after taking into consideration D.L.'s wishes and his therapist's opinion.

Father and D.L. had four supervised visits between June and September 2007. In October the Bureau reported that D.L. was reluctant to attend visits and at times seemed nervous and apprehensive. D.L. refused to hug Father, and although the two would play together, on the ride home D.L. would ask the parent aid to "stop these visits." D.L. said he did not like the way Father acted, that Father said bad things to Mother and that he scared D.L. Even though D.L. said he didn't like Father, he could not explain why he did

not want to be with him. The court continued the monthly supervised visits, and ordered a therapeutic visit to occur before a review hearing scheduled in November.

By the time of the November review, the therapist had attempted to conduct the therapeutic visit, but she reported that D.L. was not receptive to the plan. The therapist believed it would be necessary for her to build rapport with D.L. before introducing Father into a therapy session, and that before sufficient work with D.L., contact with Father may be detrimental to him. D.L. did not indicate any desire to be with Father and became anxious when he was asked to talk about him. Despite D.L.'s reluctance and wishes, his monthly visits with Father continued. In light of the therapist's concerns, the Bureau recommended that visits be terminated.

By January 2008, the Bureau changed its position. It reported that Mother's anxiety may have had something to do with D.L.'s reluctance to attend a visit, and that during the visit D.L. did not show any signs of fear or anxiety. Once again, the Bureau recommended monthly supervised visits for Father and the court continued them. But during subsequent visits D.L. continued to exhibit behavior and say things that indicated he did not want to see Father. So, the Bureau again recommended that visits be terminated. At this juncture, the court vacated the first dependency and ordered Father two hour supervised visits twice each month.

The second dependency began approximately two months later in June 2008. D.L. was ordered detained, and supervised visitation with Mother and Father was ordered at a minimum of twice a month.[3]

The Bureau's disposition report recommended that the court order family reunification services for Mother and Father. D.L. was placed with his maternal grandmother while Mother was in a residential treatment program. Father said he would

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[3] The detention order further stated "*Danielle W.* to apply" thus making visitation subject to the Bureau's limited discretion. (See *In re Danielle W.* (1989) 207 Cal.App.3d 1227.)

do "whatever it takes to provide for [D.L.]'s needs and want[ed] to have unsupervised time and then care for him full-time." But his relationship with D.L. was "very limited," and none of the twice monthly visits ordered by the court at the conclusion of the first dependency had occurred.

Early in this second dependency, Father and D.L. had two supervised visits. It appears the visits were fairly amiable but "somewhat strained." D.L. was said to be "somewhat stiff," and only agreed to go along with the visits if the social worker remained present with Father and D.L. the entire time. D.L.'s apprehension and anxiety about visiting with Father led the social worker to conclude that further visiting only occur after therapists agree that it could resume. Father also told the social worker that further visits should be scheduled closer to his home, on weekends and unsupervised. The Bureau opposed D.L.'s possible placement with Father due to the child's reluctance to have contact with him, their lack of a continuous relationship and Father's unrealistic expectations that in the circumstances he could be D.L.'s full-time parent.

In August 2008, the court ordered that visits resume until D.L.'s therapist reported to the court. A parent aide reported that D.L. was very uncooperative during an August 22nd visit with Father. It appeared D.L. did "not want to engage with his Father at all," and the visit ended early because D.L. wanted it to end.

In September, the Bureau filed a letter from D.L.'s therapist as an attachment to a memo from the Bureau. The therapist explained that she started providing services to D.L. in March 2007, and while their appointments were suspended for a time, she resumed seeing him on September 4. D.L. consistently demonstrated anxiety when he was asked about Father or the possibility of seeing him, and was clear that he did not want visits. The Bureau recommended that further visits between D.L. and Father continue to be scheduled after considering D.L.'s views and those of the therapist.

In September 2008, the court conducted the disposition hearing in this second dependency. Again, Father did not request custody, but contested the Bureau's

recommendation regarding visitation. A hearing regarding Father's visitation rights was conducted on October 1. D.L.'s therapist testified that although she could not identify the source of D.L.'s fear and anxiety about Father, his feelings were genuine. D.L. could not express his feelings other than to say that he didn't like Father. Although the therapist thought D.L.'s ability to express his feelings were more limited than an average six year old's, she did not get the impression that someone was trying to influence D.L. She was also of the opinion that a therapeutic visit at that time would be detrimental to D.L.'s well-being. The therapist declined to make a recommendation in her testimony, but the Bureau had asked the therapist to recommend in her report that visits be terminated.

Two social workers testified. A social worker who observed visits between Father and D.L. in the previous dependency said there were times when the two seemed to enjoy their visits, but that it became progressively more difficult to get D.L. to go to them. After visits D.L. would request that he not be forced to visit again. The other social worker who testified observed the most recent visits. D.L. asked the social worker if he would have to go to Father's home, and that he appeared relieved when he was told that he did not. He also told the social worker that he didn't like Father because he was mean to Mother. D.L. said he felt safe after the visit was over.

Father testified that his visiting opportunities with D.L. were supervised and very limited. The earliest visits that were in public places like a bowling alley or pizza parlor were better than the visits in the Bureau's visiting rooms. He tried unsuccessfully to obtain therapeutic visits working through the social worker, and felt that it would be in D.L.'s best interest for such visits to occur because they would allow the two of them to build a relationship. Father asked for continued visitation, but never asked to be given custody of DL.

Father's lawyer also asked for supervised visits, and argued that Father's visits should not be terminated because he had done nothing wrong. The court ruled that Father should have one hour supervised visits twice each month. It was clear to the court that

contact with Father was very bothersome to D.L. While the court could not identify the source of D.L.'s anxiety, his psychological and emotional well-being compelled the court to take D.L.'s feelings about contact with Father into account when determining the issue of visitation. The court had no concerns about Father's physical contact with D.L., and expressed its hope that their emotional relationship can gradually improve with the help of the therapists. Father timely appealed.

DISCUSSION

A. Application of Section 361.2

Section 361.2, subdivision (a), provides: "When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." Father contends the court failed to fulfill its obligations under section 361.2 for two reasons. The court failed to consider placing D.L. with him, and made no finding that placing D.L. with him would pose detriment to D.L. Because Father never raised the issue of the application of section 361.2 in the juvenile court, the Bureau contends it is therefore waived on appeal. (See *In re Christopher B.* (1996) 43 Cal.App.4th 551, 558 ["[N]onjurisdictional issues must be the subject of objection or appropriate motions in the juvenile court; otherwise those arguments have been waived and may not be raised for the first time on appeal"]. Father's reply brief does not respond to this contention.

Father's argument also fails on the merits, for several reasons. Most significantly in the October 6, 2008 dispositional order, the court adopted the findings and recommendations the Bureau prepared for an August 15, 2008 review. Among them, the Bureau recommended that the court "[f]ind by clear and convincing evidence that

placement of the child with father would be detrimental to the safety, protection, or physical or emotional well-being of the child."[4] While the recommendation adopted by the juvenile court does not specifically cite section 361.2, it contains the language utilized in section 361.2, subdivision (a).

The finding is also supported by substantial evidence. (See *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426; *In re Corienna G.* (1989) 213 Cal.App.3d 73, 83-84.) The Bureau was not required to show Father was an unfit parent to avoid placing D.L. in Father's custody, but rather that placement with Father would be detrimental to D.L.'s "safety, protection, or physical or emotional well-being." (§ 361.2, subd. (a).) "The detriment need not be related to parental action and emotional harm is relevant to a detriment analysis." *(In re Luke M., supra*, at p. 1425.) As the court explained when it ruled on visitation, qualified professionals, including D.L.'s therapist, provided evidence that D.L.'s psychological and emotional well-being would be at risk unless his contact with Father was limited, at least until D.L. was able to address his fears and anxieties in therapy. At the time of the 2008 visitation ruling, D.L. was almost seven years old, had not lived with Father since infancy, and was in a stable placement with his maternal grandmother in the home where he also lived with Mother. The court's finding that placement with Father at the time of the dispositional hearing would have been detrimental to D.L.'s emotional well-being was supported by substantial evidence. (See *In re Luke M., supra*, at pp. 1425-1426.)

Moreover, the formal finding of detriment that Father says is required by the statute, is necessary only "[i]f [the noncustodial] parent requests custody . . . ." (§ 361.2, subd. (a).) Father cites no authority that requires a juvenile court to explain why it did

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[4] The text of the Bureau's disposition report also included a section entitled "Consideration of Placement with Non-Custodial Parent" that stated: "Due to [D.L.] and [Father's] limited relationship and [D.L.'s] negative response to visitation with [Father], the Bureau is not recommending that [D.L.] be placed with [Father]. [Father] does not appear to have a realistic picture of what caring for [D.L.] full-time would entail."

not place a child in the care of a noncustodial parent when the parent never asked the court for custody. (See *In re Austin P.* (2004) 118 Cal.App.4th 1124, 1130-1131 [" 'custody' " as used in § 361.2, subd. (a) "means the parent is asking for the exclusive right to control decisions about the child and to have possession of the child"]; *In re Terry H.* (1994) 27 Cal.App.4th 1847, 1854-1855 [section 361.2 "contemplates a request for custody" as a "first step"]; cf. *In re Adrianna P.* (2008) 166 Cal.App.4th 44, 55 [court must consider placing child with noncustodial parent "if that parent requests custody"].)

Father contends (without citation to the record) that "[w]hile [he] was asking merely for visits, he told the social worker he wanted to be his child's full time caretaker." Indeed, the Bureau's disposition report stated: "[Father] states that he will do whatever it takes to provide for [D.L.'s] needs and wants to have unsupervised time and then care for him full-time." But Father's request for custody was never made to the juvenile court, and we will not construe Father's comment that he would like to "care for" D.L. at some unspecified time in the future as a request of the court for custody that triggers the application of section 361.2. During the September 2008 disposition hearing, Father submitted to the Bureau's recommendations other than those regarding visitation, and thus accepted the Bureau's recommendation of family reunification services rather than the award of immediate custody.[5]

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[5] Because Father never requested custody of D.L. from the juvenile court, we also reject Father's argument that the court failed to make a finding on the record as required by section 361.2, subdivision (c), which provides: "The court shall make a finding either in writing or on the record of the basis for its determination under subdivisions (a) and (b)." To the extent the statute could be read to require a specific preliminary finding regarding the court's determination of whether there was a noncustodial parent who desired to assume custody of the child, such a determination can properly be implied in this case. (See *In re Corienna G.*, *supra*, 213 Cal.App.3d at pp. 83-84 [no practical purpose would be achieved by remand for express determination by juvenile court when substantial evidence would have amply supported the statutorily-required finding].)

B. Visitation Order

Father argues the 2008 visitation order must be reversed because the court "fail[ed] throughout this case to ensure that sufficient visitation occurred between [Father] and his son to enable them to restore their relationship." But the record shows the court consistently recognized the importance of fostering the relationship between Father and D.L., and carefully considered the evidence before it in crafting visitation orders designed to allow contact with Father and protect D.L.'s psychological and emotional well-being. The court declined to suspend Father's visits, and instead ordered that they continue with appropriate safeguards. The court's observation that it did not consider D.L. physically unsafe in Father's care was made in the context of expressing its hope that the frequency of the visits with Father could be increased in the future, once D.L.'s fears and anxiety are addressed in therapy. Father has not shown that he was deprived of due process, or that the court's limitation on visits was an abuse of discretion. (See *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067 [broad deference must be shown to the trial court's exercise of discretion]; *In re Jennifer G.* (1990) 221 Cal.App.3d 752, 757 [juvenile court should determine frequency and length of visitation, and "may, of course, impose any other conditions or requirements to further define the right to visitation in light of the particular circumstances of the case before it"].)

DISPOSITION

The orders of the juvenile court are affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P. J.

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Jenkins, J.